No. 72-782

Supreme Court of the United States

October Term, 1973

GATEWAY COAL COMPANY,
Petitioner

v.

UNITED MINE WORKERS OF AMERICA;
DISTRICT NO. 4, UNITED MINE WORKERS OF AMERICA;
LOCAL NO. 6330, UNITED MINE WORKERS OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND FOR THE INTERNATIONAL UNION UAW AS AMICI CURIAE

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The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), and the International Union UAW, file this brief amici in support of the position of the respondent unions with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

The AFL-CIO is a federation of one hundred and thirteen affiliated labor organizations having a total membership of approximately thirteen and one-half million working

men and women. It is thus the majority spokesman for organized labor. The International Union UAW, with a membership of over one million five hundred thousand, is the nation's largest industrial union.

SUMMARY OF ARGUMENT

This is a strike injunction case arising out of a work stoppage over a safety dispute. If, as respondent unions argue, and the court below held, that dispute was not subject to the arbitration provision of the applicable collective agreement, the injunction was improper. *Boys Markets* v. *Clerks' Union*, 398 U.S. 235. We agree. But even if, as petitioner contends the safety dispute was indeed arbitrable it would not follow that the injunction was proper. *Boys Markets* establishes additional criteria which must be met before a strike injunction may be entered, *id.* at 253-254, but were not in this case. In order that all the issues in the case be ventilated, we address ourselves to these alternative grounds for affirmance.

Preliminarily, we begin with the precise terms of the injunction. As an adjunct to enjoining the work stoppage, the District Court directed arbitration, as *Boys Markets* clearly required. *Id.* at 254. Additionally, the Court abated the allegedly unsafe condition pending arbitration. This step too was clearly required by the basic principle (applicable under *Boys Markets*, *id.* at 254) that a "court of equity will not gamble with human life, at whatever odds, and for loss of life there is no remedy that in an equitable sense is adequate." *Harris Stanley Coal and Land Co.* v. *Chesapeake & Ohio Ry. Co.*, 154 F.2d 450, 453 (C.A. 6); cf. *Hanna Mining Company* v. *United Steelworkers*, 464 F.2d 565 (C.A. 8). However, the District

Court erred in providing that if the arbitration was in favor of the Company, it would be given automatic injunctive force by reinstatement of the foremen (whose failure to abide by safety requirements had caused the work stoppage) while preserving the restraint against further stoppages. The effect of this portion of the order was to enforce the arbitration award before it was rendered and without judicial scrutiny to insure fidelity to the agreement and public law. *United Steeworkers* v. *Enterprise Mfg. Corp.*, 363 U.S. 593, 597; *Local 453, etc.* v. *Otis Elevator Co.*, 314 F.2d 25, 29 (C.A. 2).

1. The strike injunction did not meet the precondition of *Boys Markets* that the court find that "breaches are occurring and will continue, or have been threatened and will be committed"; i.e., in cases such as the instant one that there are "violations of [the union's] no-strike obligation." 398 U.S. at 254.

(a) A strike over an arbitrable issue is not automatically a breach of the collective agreement; the obligation not to strike pending arbitration exists only where it is "freely undertaken" as a matter of contract. See *id.* at 252. There can be no doubt that § (e) of the provisions setting out the "Mine Safety Program" in this collective agreement, taken against its background of the deletion of all no-strike commitments, constitutes an express reservation of the right to strike where a local union "believes an immediate danger exists." And the court below held that the record establishes that the instant strike did come within the scope of § (e).

(b) Even if § (e) of the agreement did not preserve the miners' right to utilize an economic weapon against the

employer over safety issues, Gateway's employees retained an elemental right of self-protection, recognized both by the common law of collective agreements, and by § 502 of the Labor Management Relations Act of 1947, which entitled the miners, who honestly and reasonably believed that the working conditions set by the Company endangered their life or limb, to refuse to work under those conditions without violating the collctive agreement. Since the seminal decision of Dean Shulman in *Ford Motor Co.*, 3 L.A. 779, it has been understood throughout industry that the ordinary duty of employees to obey management's directions even when these are believed to be in violation of the agreement, and then to grieve, does not govern where the employees reasonably believe that "the improper order *** involves an unusual hazard or other serious sacrifice." *Id.* at 780; see also ,e.g., *Laclede Gas Co.*, 39 L.A. 833.

The same result follows from § 502 of the Act:

> "nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act."

This was the square holding of the leading § 502 decision, *NLRB* v. *Knight-Morley Corp.*, 251 F.2d 753 (C.A. 6), cert. denied, 357 U.S. 927; see also *Philadelphia Marine Trade Association* v. *NLRB*, 330 F.2d 492 (C.A. 3), cert denied, 379 U.S. 833, and Pet. App. p. 17a. The contrary view espoused by petitioner and the dissent below would read the "good faith" language out of § 502, and place upon the employee the unconscionable dilemma of risking his life or his livelihood.

2. The strike injunction also did not meet the preconditions of *Boys Markets* that an injunction may not issue unless the District Court determines that the breaches "have caused or will cause irreparable injury to the employer; and [that] the employer will suffer more from denial of an injunction than will the union from its issuance." 398 U.S. at 254 preserving § 7(c) of the Norris-LaGuardia Act. The District Court made no finding whatsoever with respect to the potential injury to the respondent unions, and therefore could not begin to perform its duty to balance their equities against those of Gateway. Additionally, although the District Court stated in conclusory terms that the Company would suffer irreparable injury if the injunction were denied, its only findings on the subject fall far short of supporting that conclusion. That Court did not find that Gateway, the employer, would suffer any injury; nor could it have done so since its sole product, coal, is not perishable, and Gateway's only "customers" are the three corporations who are the Company's co-owners, and take its total supply. What the District Court did find was that the strike would cause injury "in due course" to one of the owning companies, Jones & Laughlin, and to the public. But, quite aside from the lack of immediacy of the injury found (there being a 20-day supply of coal above ground at the time the strike was stopped by the District Court), neither qualifies as the "employer or the "complainant" as § 7(c) requires. For only Gateway was the miners' employer, to whom the respondent unions were contractually bound, and only Gateway could become a "complainant" by suing to enjoin the alleged breach.

ARGUMENT

This litigation had its inception in a work stoppage in response to Gateway Coal Co.'s decision to reinstate two assistant foremen who "had made false entries in their log books," in violation of federal safety requirements, "that failed to disclose that the flow of air through a work area was 11,000 cubic feet per minute as contrasted with a normal 28,000 cubic feet, [a condition which] increased the danger of the accumulation of dust and flammable gas and the risk of consequent explosion." Pet. App. pp. 13a-14a.[1] The Company's reinstatement decision was made even "though criminal proceedings against [the foremen] were still pending," and even though "some 200 Gateway employees [had] attended a special union meeting and unanimously voted not to work under the assistant foremen in question." Pet. App. 13a-14a.[2]

The Company brought this action under § 301 of the Labor Management Relations Act of 1947 (hereafter "the Act"), to enjoin the work stoppage and to direct respondent unions to arbitration under the "Settlement of Local and District Disputes" provision of the National Bituminous Coal Wage Agreement. A. pp. 3a-9a. The District Court

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[1] "Pet. App." references are to the appendices to the petition for certiorari in this case. "A." refers to the Appendix in this Court.

[2] Gateway placed great reliance on the Commonwealth of Pennsylvania's determination not to institute proceedings to suspend the foremen's licenses. But that determination was not based on a conclusion that the foremen had not made false entries, and it did not counsel the Company to return them to their supervisory positions; it merely left Gateway "at liberty" to do so. A. pp. 16a-17a.

entered a temporary restraining order (Pet. App. pp. 1a-4a), later declared to "constitute a preliminary injunction without change until further order of this Court" (Pet. App. p. 10a). The injunction embodied the following restraints:

> "First, the employees of the Gateway Mine, their officers and all members of the union and persons acting in concert with them who are aiding or abetting them in the work stoppage of the Gateway Mine are hereby enjoined from engaging in any further work stoppage and are hereby ordered to return to work on the following conditions:
>
> (a) The two assistant mine foremen heretofore identified and fully identified in the testimony shall be suspended at the time the mine resumes working and shall remain suspended until an impartial umpire has determined whether these men should return to work.
>
> (b) The proceeding before the impartial umpire shall proceed without delay. He shall be chosen by the parties as set forth in the union contract, and he shall be chosen forthwith and within 14 days from the date of this order. Thereafter, the umpire shall proceed to hear the dispute on the issue stated forthwith and as soon as the hearing can be held, and neither party to this agreement—that is, the union agreement—shall delay the proceeding before the umpire, nor shall they delay in any way getting to that proceeding and getting to the hearing that the umpire will hold.
>
> (c) The decision of the umpire will be final and both parties will be bound by that decision." Pet. App. p. 3a.

The Court of Appeals reversed. That Court determined that the dispute was not arbitrable. Pet. App. pp. 12a-19a.

This determination was sufficient to require that the injunction be set aside in its entirety. *Boys Markets* v. *Clerks Union*, 398 U.S. 235, does "not undermine the vitality of the Norris-LaGuardia Act" (*id.* at 253), but authorizes an injunction only if the agreement "*does*" require the parties to arbitrate a particular dispute (*id.* at 254, emphasis in original). Thus, if, as the union respondents urge in their brief, and as we agree, the Court of Appeals was correct in concluding that, under this particular agreement, this particular dispute was not arbitrable, the judgment below must be affirmed.

But contrary to the view of the Company and the amici who support it here, the converse does not follow; *Boys Markets* itself makes clear that there is no automatic progression from arbitrability to injunctive relief: "Nor does it follow from what we have said that injunctive relief is appropriate as a matter of course in every case of a strike over an arbitrable grievance." *Id.* at 253-254.

Because the District Court failed to comply with the standards established in *Boys Markets*, we submit that even assuming *arguendo* that the underlying safety dispute was arbitrable, its injunction against the strike (that paragraph of its order which begins "First") was wrong as a matter of law.[3]

In urging that the District Court's strike injunction

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[3] Once the District Court enjoined the work stoppage, paragraph "(a)" of the injunction was mandated by equitable principles as we develop in the text. Moreover, paragraph "(b)" directing the parties to arbitration of the dispute, was, of course, required by *Boys Markets*.

However, even if the strike injunction was otherwise legally cor-

was properly reversed by the Court of Appeals, we do not adopt that portion of the latter's opinion which states that arbitration of safety disputes is not to be encouraged. Pet. App. pp. 16a-17a. While the collective agreement in this case does not provide for arbitration of grievances arising from employee complaints about conditions which they believe to be unsafe, these are, in other industries, familiar and valuable adjuncts of collective bargaining. There, the gravity of the stakes, correctly and eloquently described by the Court of Appeals (Pet. App. pp. 16a-17a), is accommodated, not by eliminating arbitration, but by reversing a generally applicable rule of industrial relations and permitting the employees to refuse, pending arbitration,

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rect, paragraph "(c)" thereof was erroneous and should be set aside. For, when paragraph "(c)" is read in light of the Memorandum, it gives injunctive effect to the arbitration award even though the arbitration had not yet been held:

> "Obviously, if the umpire determines that these men are not to be returned to work, they shall not return. If he determines that they shall return, they will be returned to work, or at least they will be eligible for return to work, and the company can return them to work if the assistant foremen are available and the mine shall continue working." Pet. App. p. 4a.

This of course was clear error. For even assuming that the parties had provided for final and binding arbitration, as the District Court determined, the award rendered by the arbitrator was not automatically enforceable. This is established by the very case on which petitioner relies, *United Steelworkers* v. *Enterprise Mfg. Co.*, 363 U.S. 593, 597. Moreover,

> "It is no less true in suits brought under § 301 to enforce arbitration awards than in other law suits that the 'power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States.***' The public policy to be enforced is a part of the substantive principles of federal

to perform work which they reasonably believe to be unsafe. See pp. 17-20 *infra*. The order of the District Court was in harmony with that practice, because paragraph "(a)" thereof abated the dangerous condition by suspending the foremen involved pending the arbitration.

The propriety of that condition is not disputed by any of the parties or the amici in this case. Nevertheless, the point is of sufficient importance for future litigation concerning work stoppages over arbitrable safety disputes that the lower federal courts should be instructed that the indespensable precondition for an injunction against such work stoppages is a direction by the court requiring that the allegedly unsafe conditions be abated until the arbitrator's

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labor law which federal courts, under the mandate of Textile Workers Union of America v. Lincoln Mills, 353 U.S. 448, are empowered to fashion." *Local 453, etc.* v. *Otis Elevator Co.*, 314 F.2d 25, 29 (C.A. 2)

Thus, before enforcing an award in a safety case the court must determine both that the award "draws its essence from the collective bargaining agreement" (*Enterprise*, 363 U.S. at 597), and that it is consistent with § 502 of the Act. dismissed at pp. 21-24 *infra*. See, e.g., *Carey* v. *Westinghouse Corp.*, 375 U.S. 261, 272.

Since the award was made subsequent to the District Court's decision, that Court has not yet performed its duties under *Enterprise*. Accordingly, even if all other issues were decided in favor of petitioner, the sound disposition of the case (28 U.S.C. § 2106) would be to vacate part "(c)" of the injunction, as amplified in the opinion, and to remand the case to the District Court. It would seem inappropriate for this Court to review the arbitration award in the first instance, since it is not part of the record despite petitioner's attempt to treat it as such by reprinting it as an appendix to the petition for certiorari. The Court of Appeals struck the Company's supplemental appendix consisting of the arbitration award (A. 38a), and the petition did not seek review of that order.

award is either accepted by the union or subjected to judicial review in enforcement proceeding pursuant to *Enterprise*. See pp. 8-10, n. 3 *supra*. The decision in *Hanna Mining Company* v. *United Steelworkers*, 464 F.2d 565 (C.A. 8), is a careful and detailed example of an order which preserves the immediate interests of the employees in safety and of the employer in production, pending arbitration. Imposition of such a condition is merely the application of equitable principles, which *Boys Markets* preserves in strike injunction cases. As the Sixth Circuit explained, in reversing the denial of an injunction sought by a railroad against a mining company whose operations posed a potential danger to individuals using the railroad's right-of-way:

> "If the threatened injury to the railroad right-of-way be envisioned merely as the sliding of some of the surface material of the mountain upon the railroad right-of-way necessitating some expense in its removal and in the repair of the roadbed, we might well say that recovery of damages in a suit at law provides adequate remedy. We have here, however, a railroad over which pass trains bearing passengers and freight. Their daily number is not disclosed by the record, and being but a branch line it may be assumed that the traffic is not heavy. Nevertheless, traffic there is, and the effect of a substantial mountain slide upon a passing train might well be catastrophic. It may be that such disaster could occur only upon a concatenation of circumstances of not too great probability, and that the odds are against it. It is common experience, however, that catastrophies occur at unexpected times and in unforeseen places. The pictorial exhibits graphically depict the steep face of the cliff behind which the pillars stand, and its proximity to the railway tracks, and it is indeed bold prophecy which denies the threatened danger. *A*

court of equity will not gamble with human life, at whatever odds, and for loss of life there is no remedy that in an equitable sense is adequate." *Harris Stanley Coal and Land Co.* v. *Chesapeake & O. Ry. Co.*, 154 F.2d. 450, 453 (C.A. 6), emphasis added.

With these preliminaries, we now show that the District Court erred in enjoining the work stoppage in this case.

1. For a *Boys Markets* injunction to issue there must be a finding that "breaches are occurring and will continue, or have been threatened and will be committed"; i.e., in cases such as the instant one that there are "violations of [the union's] no-strike obligation." 398 U.S. at 254.

(a) Where, as in *Boys Markets*, the dispute is determined to be arbitrable and there is an explicit no-strike clause coextensive with the arbitration commitment, a strike called by the union is a breach of the agreement absent overriding special circumstances. Moreover, where a dispute is determined to be arbitrable, and the contract does not expressly reserve the union's right to self-help, a strike called by the union is also a breach of the agreement absent overriding special circumstances. *Teamsters Local 174* v. *Lucas Flour Co.*, 369 U.S. 95, 106. But this Court has emphasized that neither *Lucas Flour* nor *Boys Markets* creates an independent legal obligation not to strike pending arbitration; that obligation exists only where it is "freely undertaken" as a matter of contract. See 398 U.S. at 252. Thus, the parties may, if they so desire, agree to preserve their right to utilize self-help concerning an arbitrable issue and pending arbitration.[4]

[4] In the instant case it is the company that seeks judicial relief and the respondent unions that claim that they have not waived

In *Boys Markets,* the collective agreement made it manifest that the express no-strike commitment contained therein was coextensive with the scope of the arbitration clause. See 398 U.S. at 238-239, n. 3. The clerks union did not argue that its strike was lawful under the agreement; its sole contention was that though in breach of contract the strike was not enjoinable under *Sinclair Rfg. Co.* v. *Atkinson,* 370 U.S. 195. In the instant case, however, the respondent unions do assert that they have a right to strike over this dispute. As we have already noted, their position is that §(e) of the provisions setting out the "Mine Safety Program" in their collective agreement provides for the settlement of this dispute by economic force and not by arbitration. [5]

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their right of self-help and that no injunction requiring them to bend to the employer's will should issue. But the contract interpretation and equitable issues presented here also arise in cases instituted by unions and in which the employer claims that he has retained his right of self-help and that no injunction should run in favor of the union. See *Detroit News. Publ. Ass'n.* v. *Detroit Typo. Un. No. 18* Etc., 471 F.2d 872 (C.A. 6) cert. denied 41 L.W. 3591 (May 7, 1973); compare *Shore Line* v. *Transportation Union,* 396 U.S. 142. It is for this reason that we refer to the "parties'" right to retain the option of self-help and not solely to the "unions'" right to do so.

[5] "The mine safety committee may inspect any mine development or equipment used in producing coal. If the committee believes conditions found endanger the life and bodies of the mine workers, it shall report its findings and recommendations to the management. In those special instances where the committee believes an immediate danger exists and the committee recommends that the management remove all mine workers from the unsafe area, the operator is required to follow the recommendation of the committee.

"If the safety committee in closing down an unsafe area

Even if this Court were to decide that the breadth of the clause entitled "Settlement of Local and District Disputes" (A. pp. 13a-14a) permits the conclusion that arbitration is in order here, there can be no doubt that §(e), taken against its background of the deletion of all no-strike commitments (see A. p. 14a), constitutes an express reservation of the right to strike where a local or its mine safety committee "believes an immediate danger exists." Any other interpretation of §(e) would read it out of the agreement. In other words, even if it is read narrowly, §(e) must be acknowledged to be an express reservation of the right to strike over safety issues while the grievance and arbitration procedures are running their course. And, as the Court of Appeals stated, the record establishes that the strike here comes within the scope of § (e):

> "There is no finding, indeed no basis for a finding in this record, that the miners did not honestly believe that their lives were unduly endangered so long as the foremen in question were responsible for safety procedures. The foremen had been guilty of significant dereliction. Indeed, they pleaded *nolo contendere* to a charge of criminal violation of safety requirements and were fined $200 each. And there had been a few earlier complaints concerning their handling of matters involving safety." Pet. App. p. 14a.

The present situation is therefore governed by the fundamental proposition stated by Judge Hays in *Standard Food*

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acts arbitrarily and capriciously, members of such committee may be removed from the committee. Grievances that may arise as a result of a request for removal of a member of the safety committee under this section shall be handled in accordance with the provisions providing for settlement of disputes." A. 12a.

Products v. *Brandenburg,* 436 F.2d 964, 965 (C.A. 2): "Where the union has not given up the right to strike, the Norris-LaGuardia Act prohibits the issuance of an injunction." To paraphrase the *Brandenburg* opinion: Since, as the court below found "the strike in the instant case was called [pursuant to §(e)] the injunction issued by the district court is not only unjustified, but is beyond the jurisdiction of the federal courts to grant. 29 U.S.C. §§101, 107 (1964)." *Ibid.*

(b) The burden of the preceding point is that §(e) of the "Mine Safety Program" Clause, read most restrictively, preserves (at least to the point where the arbitrator has issued his decision), the respondent unions' right to exert economic pressure to induce the employer to settle a safety dispute by meeting the miners' demands and that the District Court lacked jurisdiction to grant the portion of the injunction labeled "First." See pp. 12-14 *supra.* We now show that assuming *arguendo* that §(e) is not an express reservation of economic power, the Gateway employees had an elemental right of self-protection, recognized, both by the common law of collective agreements, and by §502 of the Act, which entitled the miners, who honestly and reasonably believed that the working conditions set by the Company endangered their life or limb, to refuse to work under those conditions without violating the collective agreement.[6]

[6] It may be useful to spell out this distinction. Usually an abnormally unsafe condition jeopardizes only a single employee, or a small portion of the work force. Under the arbitration decisions to be discussed at pp. 17-19 *infra*, as well as under § 502, it is only the employees directly affected who are privileged to refuse to perform the work believed to be abnormally dangerous. Where a no-strike agreement is in effect, the other employees are not privileged,

(i) In *Mastro Plastics Corp.* v. *Labor Board,* 350 U.S. 270, this Court unanimously refused to read a no-strike clause, all encompassing in its terms, to apply to an unfair labor practice strike. The Court reasoned that the union's undertaking "in light of the law relating to it when made," was a "natural adjunct of an operating policy aimed at

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either under these arbitration decisions or under § 502, to make common cause with them. Put another way, this right exists solely for the employees' self-protection; it does not permit the use of economic power to compel the employer to abate the particular unsafe condition, or to be generally more responsive to the needs of the employees' health and safety.

In the present case, the respondent unions assert, with justification, that the present dispute was not encompassed by the no-strike clause, and that they were therefore permitted to use a work stoppage for offensive purposes. Putting that aside, the particular objection in this case was to the use of two foreman who had falsified records requiring by law to be kept for safety purposes. Contrary to the Company's argument, that is an issue which affected the safety of all employees: The retention of those foremen did not jeopardize only the miners who worked on the same shift; it is likely that a failure to comply with safety standards on one shift will affect the condition of the mine and therefore of all the employees.

Finally, it is appropriate to contrast two other related situations. In the leading § 502 case, *NLRB* v. *Knight-Morley Corp.* 251 F.2d 753 (C.A. 6), cert. denied 357 U.S. 927, some buffers believed in good faith that conditions in their work room were abnormally dangerous, and ceased work for that reason. That action was held to be protected. Knight-Morley's discharge of the employees despite their statutory protection was an unfair labor practice, and the cessation of work by other employees in response was therefore a protected unfair labor practice strike. Moreover, of course, in the absence of a no-strike commitment, a concerted stoppage over health or safety conditions is protected by § 7. See *Labor Board* v. *Washington Aluminum Corp.,* 370 U.S. 9.

avoiding interruptions of production prompted by efforts to change existing *economic* relationships," and that the "main function of arbitration under the contract is to provide a mechanism for avoiding *similar stoppages* due to disputes over the meaning and application of the various contractural provisions." *Id.* at 282-283, emphasis supplied.

It is also commonly understood that accomplishment of this objective does not require that pending arbitration over safety disputes the employees must perform work that that they reasonably believe to be abnormally hazardous to their safety and health.

Ordinarily when an employee is given an order by management, he must obey. If the employee believes that the order is in violation of his rights under the agreement, his recourse is the grievance procedure. If he refuses to comply with the order he is subject to discipline, even if it should ultimately be determined that the order was contrary to the agreement. *Cf. United States* v. *Mine Workers,* 330 U.S. 258. This is the general rule reflected in, and effectuated by the *Lucas Flour* and *Boys Markets* decisions. That rule, however, is subject to an important exception: An employee is not required to obey an order from management, if he would thereby violate public law, or if he believes that it would jeopardize his health or safety.

The leading statement of the general rule, and of the exception thereto, is that of the late Dean Shulman, who was the permanent umpire under the Ford Motor Company agreement:

> "The employee must normally obey [management's] order even though he thinks it improper. His remedy is prescribed in the grievance procedure. He may not

> take it on himself to disobey. To be sure one can conceive of improper orders which need not be obeyed. An employee is not expected to obey an order to do that which would be criminal or otherwise unlawful. He may refuse to obey an improper order which involves an unusual hazard or other serious sacrifice. But in the absence of such justifying factors, he may not refuse to obey merely because the order violates some right of his under the contract. The remedy under the contract for violation of right lies in the grievance procedure and only in the grievance procedure." *Ford Motor Co.*, 3 L.A. 779, 780.

This exception has been applied time and time again by arbitrators and is now accepted as "a truism in the common law of the shop." *Minnesota Mining and Mfg. Co.*, 59 L.A. 375, 378. For example, in *Laclede Gas Co.*, 39 L.A. 833, 839 the arbitrator stated:

> "The principle applicable here is that an employee may refuse to carry out a particular work assignment, if at the time he is given the work assignment, he reasonably believes that by carrying out such work assignment he will endanger his safety or health. In such an instance the employee has the duty, not only of stating that he believes there is risk to his safety or health, and the reason for believing so, but he also has the burden, if called upon, of showing by appropriate evidence that he had a reasonable basis for his belief. In the case of dispute, as is the case here, the question to be decided is not whether he actually would have suffered injury but whether he had a reasonable basis for believing so. This is so well understood that the chairman does not believe that the general acceptance of this principle requires documentation."[7]

[7] Another arbitrator has characterized *Laclede Gas* as "a partic-

In *Ford Motor Company,* Dean Shulman focused his attention on the basic rule, and explained why it was both essential and fair:

> "[A]n industrial plant is not a debating society. Its object is production. When a controversy arises, production cannot wait for exhaustion of the grievance procedure. While that procedure is being pursued, production must go on. And some one must have the authority to direct the manner in which it is to go on until the controversy is settled. That authority is vested in supervision. It must be vested there because the responsibility for production is also vested there; and responsibility must be accompanied by authority. *It is fairly vested there because the grievance procedure is capable of adequately recompensing employees for abuse of authority by supervision.*" 3 L.A. at 781; emphasis supplied.

The foregoing also provides the principled justification for the exception for unusual health hazards recognized by Dean Shulman and developed by his successors. To borrow Dean Shulman's words, "the grievance procedure is [*not*] capable of adequately recompensing employees for abuse of authority by supervision" where that abuse requires action inconsistent, not with the employees' economic interest, but with their interest in continued health and

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ularly apt expression of the principles involved *** synthesized from many other awards." *A. M. Castle & Co.*, 41 L.A. 667, 670. And in *A. M. Castle* the arbitrator elaborated a point inherent in the *Laclede Gas* analysis but not explicated there:

> "So long as [the employee] is sincere in his belief of danger, and so long as he makes a "reasonable" appraisal of the potential hazards, he is protected in his decision not to act, regardless of whether later on, in fact, it would be established that no hazard existed." 41 L.A. at 671.

safety. Thus, fairness to the employees requires that the costs of delay during "exhaustion of the grievance procedure" be placed on the employer. Compare *Harris Stanley Coal,* 154 F.2d at 253, quoted at pp. 11-12 *supra.*[8]

But it is not enough for the protection of employees that the normal order of obedience followed by arbitration be reversed. For if they are ultimately subject to discipline for refusing to perform assigned work if the arbitrator should determine that it was not abnormally hazardous, the employees, who can rarely be certain of the fact of danger, would hesitate to assert their right not to endanger themselves. The industrial common law as developed in arbitration, relieves employees from this dilemma by framing the issue to be whether the employees had a "reasonable basis" for believing that carrying out the work assignment would endanger their safety and health, viewing the matter from their perspective and in light of the information available to them. See pp. 18-19 and n. 7 *supra.*[9]

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[8] The costs of delay can be reduced by providing an accelerated procedure for the arbitration of safety disputes, as in the contracts between the United Steelworkers and the major steel producers. See, e.g., §14c of the Agreement between United States Steel Corporation and the United Steelworkers of America, August 1, 1971, 1 BNA Collective Bargaining Negotiation & Contracts, 28.40.

[9] Compare *Smith* v. *California,* 361 U.S. 147. There this Court held that in a prosecution for selling obscene books the state must prove that the defendant was aware of its contents, lest he restrict the books he sells to those he has inspected. Particularly in point for present purposes is this Court's approving quotation (*id.* at 153) of *The King* v. *Ewart,* 25 N.Z.L.R. 709, 729 (C.A.):

> "Every bookseller would be placed under an obligation to make himself aware of the contents of every book in his shop. It would be altogether unreasonable to demand so near an approach to omniscience."

(ii) The exception to the no-strike commitment for health and safety disputes articulated by Dean Shulman and refined by later arbitrators finds a statutory counterpart in §502, the "Savings Provision" of the Act, which states:

> "nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act."

Taft-Hartley's legislative history does not provide a gloss on the Act's language, [10] and the Sixth Circuit, in the leading §502 decision, therefore gave the provision its natural reading:

> "That section expressly limits the right of management to require continuance of work under what the employees in good faith believe to be 'abnormally dangerous' conditions. *** Since Section 502 provides that walking out under a good faith belief of abnormally dangerous conditions does not constitute a strike, the no-strike provision [in the agreement] was not applicable." *NLRB* v. *Knight-Morley Corp.*, 251 F.2d at 759.

So here, if employees could be punished for refusing work which was not abnormally unsafe, although they reasonably believed it to be, they would be penalized for their lack of "omniscience" regarding what are often complex technical or scientific problems beyond their ken.

[10] The following are the sole references to §502 in the reports and debates which preceded the passage of the Act. Legislative History of the Labor-Management Relations Act of 1947 (G.P.O., 1948), pp. 29, 156, 290, 436, 573, 895. None of them explains its scope.

Thus, the Sixth Circuit's opinion in *Knight-Morley* parallels the law developed by the arbitrators as articulated in the *Laclede Gas* decision. The Court of Appeals stated that a no-strike commitment does not bar a walk-out "under a good faith belief of abnormally dangerous conditions." The arbitrator speaks of a right to refuse work where the employee "reasonably believes that by carrying out such work assignment he will endanger his safety or health." *Laclede Gas,* 39 L.A. at 839. This minor difference in terminology cannot, however, obscure the central point that both focus on an evaluation of the situation as it appeared to the employees at the time and provide that a refusal to work does not breach the no-strike obligation so long as the employees are actuated by honest and reasonable safety or health grounds for their refusal. To require more, for example, that the employees show, not simply that they acted reasonably and honestly, but that they were correct, viewing the matter in hindsight and in light of all of the facts as subsequently developed by experts in the field, would be to disregard the gravity of the stakes to the employees. See pp. 17-20 *supra.* Indeed, that construction would rewrite §502 in a manner which saves employees little of substance.

This is shown by the Eighth Circuit's decision in *NLRB* v. *Fruin-Colnon Construction Co.*, 330 F.2d 885, 892 (C.A. 8), which refused to follow *Knight-Morley*, and declared:

> "[T]he effect of Section 502 in its application to the case at hand is that if employees acting concertedly leave their jobs believing in good faith abnormally dangerous working conditions prevail, they run the risk of discharge for engaging in a 'strike' in contra-

> vention of a 'no-strike' clause in their collective bargaining agreement or for participating in the unprotected activity of dictating to management their own terms and conditions of employment, should proof later of the physical facts fail to support their prior belief."

We think that the same court's decision in *Hanna Mining*, 464 F.2d 565, eschewed this Draconian approach to the rights of industrial workers, and properly so. For it is plain that "no enlightened society" imposes on an employee such a Hobson's choice between a risk to his life or his livelihood. Cf. Pet. App. p. 17a.

The *Knight-Morley* test was followed by the Third Circuit in *Philadelphia Marine Trade Association* v. *NLRB*, 330 F.2d 492 (C.A. 3), cert. denied 379 U.S. 833, and was approved by the majority below (Pet. App. p. 17a). Yet it was objected in dissent:

> "This test will require a court to accept the naked assertion of an employee that the presence of one of his fellow employees in a plant constitutes a safety hazard." Pet. App. p. 22a.

But this argument, which is adopted by the Company herein (Pet. Br. p. 39), disdains the teachings of experience. For, as we have shown above, the reading of §502 which we urge, is identical to that of the common law of the shop developed by arbitrators; the acceptance of that rule in "other industries" for many years, establishes that petitioner's fears of "chaos and unrest" (Pet. Br. p. 39) are wholly unjustified. More generally, "it has been sometime now since the law viewed itself as impotent to explore the actual state of

man's mind." *Smith* v. *California*, 361 U.S. at 154, and the authorities there cited.[11]

As we have already noted, p. 14 *supra*, the majority in the court below found that the walk-out here was predicated on an honest belief that supervision by these foremen would unduly endanger the miners' lives. Pet. App. p. 14a. Plainly, deliberate falsification of safety records suffices to establish that the foremen's regard for the safety of the mine was less than that of "the ordinary men in the calling." *Boudoin* v. *Lykes Brothers Steamship Co.*, 348 U.S. 336, 339, quoting *Jones* v. *Lykes Bros. Steamship Co.*, 204 F.2d 815, 817 (C.A. 2, L. Hand, J.). As the *Boudoin* case illustrates, men as well as machines can render a working place unsafe. At best the hazards facing miners border on the "abnormally dangerous." Certainly the miners' insistence that the Company provide them with supervisors willing to abide by the minimal safety regulations imposed by law for their benefit was entirely reasonable. The report of the Pennsylvania Department of Enviromental Resources relied on in the dissent below (Pet. App. p. 21a), does not justify a contrary conclusion. That agency did not decide that the foremen did not falsify records, nor that the employment of foremen who commit such violations does not increase the risks of working in the mines. See p. 6, n. 2 *supra*. The dissent's pleading point "that the union has never complained about the alleged past viola-

[11] The arbitration decisions cited at pp. 17-19 *supra*, which correctly insist that the employees' refusal to work on health and safety grounds must be reasonable (in light of the situation as it appeared at the time), demonstrate that the standard we propose here is not, as the Company would have it (Pet. Br. pp. 35-38), a purely subjective one.

tions" (Pet. App. p. 20a) by the same foremen, assumes that one deliberate falsification of safety records, in *this* industry, is not enough.

2. *Boys Markets* also prohibits the district courts from issuing a strike injunction unless the court finds that injunctive relief is appropriate under established equitable principles: the district judge can not go forward unless he determines that the breaches "have caused or will cause irreparable injury to the employer; and [that] the employer will suffer more from the denial of an injunction than will the union from its issuance." 398 U.S. at 254.

Adherence to these conditions is indispensable to fulfill the assurance of *Boys Markets:* "We do not undermine the vitality of the Norris-LaGuardia Act." *Id.* at 253. Rather, §7 of that Act remains fully applicable.[12] We are here particularly concerned with subsection (c):

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[12] This has been understood by the lower courts. For example, in *Emery Air Freight Corporation* v. *Local Union 295,* 449 F.2d 586, 588 (C.A. 2), the Second Circuit said:

> "We emphasized [in *New York Telephone Co.* v. *Communications Workers of America*, 445 F.2d 39 (C.A. 2)] that the Act still applies to all labor disputes in which a federal court can issue an injunction, that nothing in Boys Markets, Inc. v. Retail Clerk's Union, Local 770, 398 U.S. 235 (1970), is to the contrary, and that although that decision allows an employer injunctive relief in a labor dispute, such relief is limited to vindicating the arbitration process. *See* Note, 71 Colum.L.Rev. 336, 342-44 (1971). [445 F.2d at 49] Thus, before an employer in a dispute with a union can obtain an injunction, there are a number of conditions to be satified. Section 7 of the Act, 29 U.S.C. §107, lists a good many of them."

And the Sixth Circuit held in *Detroit News. Pub. Ass'n.,* 471 F.2d at 875:

> "The fact that this case involves an injunction against the employer does not mean that the District Court was free to

"No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, *** except after findings of fact by the court, to the effect"

* * *

"(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief."

The purpose of that provision was clearly spelled out by Frankfurter and Greene:

"We have referred to the political difficulties confronting the federal judiciary through its interventions in industrial conflicts. Injunctions ought never to become routine. As the present Chief Justice [Taft] once observed:

> 'Government of the relations between capital and labor by injunction is a solecism. It is an absurdity. Injunctions in labor disputes are merely the emergency brakes for rare use and in case of sudden danger.'

No one can examine the record of litigation in the federal courts and continue to believe that the Chief Justice's warning has been heeded. The curb proposed in clause (c) is merely a paraphrase of the accepted doctrine of equity that issuance of a temporary injunction must rest upon a balance of convenience, but makes it explicit because experience has revealed the temptations to neglect this doctrine in labor controversies. Courts will thus have to consider more sharply, not merely the case for the complainant, but also the

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ignore the procedural mandates set forth in §7 of the Norris-LaGuardia Act or to grant an injunction in the absence of irreparable harm."

> union's stake in the controversy—its actual investment of time and money in the organization and conduct of the strike and, most important, the irretrievable damage to a strike and later reversal or modification of an injunction cannot ameliorate."[13]

In the present case, the opinions of the District Court show on their face that the entry of the injunction was contrary to the requirements of §7(c) and *Boys Markets*. The issue is not discussed in the Memorandum and Order of June 28, granting the preliminary injunction; one must indulge the assumption that that memorandum incorporated by reference the following portion of the first paragraph of the Court's temporary restraining order issued on June 18:

> "*** it is apparent to the Court that the Gateway Mine, owned by Jones and Laughlin Steel Corporation, Wheeling, Pittsburgh Steel Corporation, and Chenango Furnace Company, is not working, has not been working for some time, specifically since June the 2nd, 1971, and the men who belong to Local 6330 of the United Mineworkers of America have not reported for work since that date, it appears to the Court and we find that the operations of Jones and Laughlin Steel Corporation will be adversely affected by the continued closing of the mine and the lack of coal will seriously interfere with coke and steel manufacturing operations over an extended period of time, which will lead, in due course, to an effect upon the steel making facilities of the corporation, and there is no question in the Court's mind that the continued inactivity of the mine will cause irreparable harm not only to the plaintiff but to

[13] F. Frankfurter and N. Greene, *The Labor Injunction*, pp. 221-222 (1930), footnotes omitted.

> the great mass of people who depend upon the miners for their livelihood, that is, the miners who are working there." Pet. App. pp. 1a-2a.

It is evident on the face of the District Court's opinion that it ignored "the union's stake in the controversy" (Frankfurter and Greene, *supra*) and thus did not even begin to exercise its duty under *Boys Market* to weigh the respective equities of the parties. The Court's tacit assumption that the union loses nothing by being enjoined in a strike is two generations behind the times. That alone is sufficient to require reversal of the injunction against the work stoppage.

The condition "that the employer has suffered irreparable injury" has likewise not been met. The present case is in stark contrast to *Boys Markets*, where the employer was a grocery chain, with perishable products, and retail customers who could fulfill their everyday needs by patronizing the employer's competitors. Gateway's product, however, is coal, which has been in the ground for millions of years, and which would not lose in value by remaining there for the additional days, weeks, or even months of a strike;[14] moreover, Gateway would lose no business, since its "customers" (R. 34) [15] are, as Gateway's President testified, the three companies who jointly own it (R. 3, 30).

Thus, while the District Court stated "that the continued inactivity of the mine will cause irreparable harm *** to the

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[14] There was no showing that the market price of the coal would fall; that would in any event be an injury compensable by money damages.

[15] "R." refers to the Appendix in the Court of Appeals, which is part of the record in this Court.

plaintiff" (Pet. App. p. 1a), it was unable to point to any injury to that "plaintiff," namely Gateway. The harm which the Court did find was to Jones & Laughlin Steel Corporation, a part owner and customer of Gateway, and to the general public. Pet. App. pp. 1a-2a. But neither Jones & Laughlin nor the general public is a "complainant" (Norris-LaGuardia Act, §7(c)) in this action, and respondent unions owe a contractual duty to neither. *Boys Markets* requires a finding of "irreparable injury to the employer" (398 U.S. at 254) not to others with whom he has an economic relationship. To be sure, a strike, or at least a successful one, inevitably inflicts some injury on third parties with whom the employer does business.[16] But Congress has been quite specific in describing the circumstances under which a strike may be enjoined in the public interest, see §§206-210 of the Act, dealing with national emergency disputes; and it has declined to protect secondary employers against the "foreseeable disruptions" of a primary strike.[17] Insistence upon the separate identity of Gateway on the one hand and its three corporate owners on the other, is there-

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[16] This is particularly true if the injury is deemed to be sufficient to warrant an injunction as long as it will occur "in due course." Pet. App. p. 1a. Here the testimony of Gateway's own witness was that it had 40 days' supply of coal on the ground at the time the strike began (R. 40) and thus over 20 days' supply at the time the temporary restraining order was entered. The strike could, therefore, have been permitted to continue for almost three weeks without injury to even Jones & Laughlin.

[17] "Some disruption of business relationships is the necessary consequence of the purest form of primary activity. These foreseeable disruptions are, however, clearly protected" *NLRB* v. *Operating Engineers*, 400 U.S. 297, 304.

fore not a technicality; it is essential to retain the vitality of the irreparable injury requirement in strike injunction cases. [18]

Thus, as in *Detroit News, Pub. Ass'n.*, 471 F.2d at 875, the injunction must be reversed because the District Court erred in evaluating the controlling equitable considerations. [19]

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[18] Indeed, when the shoe is on the other foot, neither the fact of part ownership, nor the supplier-customer relationship, would take Jones & Laughlin outside the protections of the secondary boycott provisions of the Act if the respondent unions had chosen to extend their disputes, for example, by striking not only Gateway but Jones & Laughlin as well.

[19] In the *Detroit Newspaper* case a union had obtained an injunction prohibiting an employer from utilizing self-help pending arbitration where the collective agreement contained an explicit status quo provision (i.e., a provision limiting management in the same manner as an explicit no-strike clause limits labor). Since "[t]he Noris-LaGuardia Act was responsive to a situation *** [in which] the federal courts generally were regarded as allies of management in its attempt to prevent the organization and strengthening of labor unions" *(Boys Markets*, 398 U.S. at 250), the irreparable injury requirement is entitled to no less rigorous adherence in strike injunction cases.

CONCLUSION

For the reasons stated in Respondents' Brief, and herein, the judgment below should be affirmed.

Respectfully submitted,

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